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No. 1033

# In the SUPREME COURT OF THE UNITED STATES

October Term, 1968

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LINDA MCINNIS, ET AL., APPELLANTS,

v.

RICHARD B. OGILVIE, ET AL., APPELLEES.

---

*APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION*

---

## MOTION TO FILE BRIEF SUPPORTING JURISDICTIONAL STATEMENT AND BRIEF FOR

American Federation of Labor–Congress of Industrial Organisations

American Federation of Teachers

International Union, UAW

Western Center on Law and Poverty

## AS AMICI CURIAE

---

*Of Counsel:*
Benjamin V. Cohen
Washington, D.C.

Joseph L. Rauh, Jr.
John Silard
Elliott C. Lichtman
Rauh and Silard
1001 Connecticut Ave. N.W.
Washington, D.C. 20036
*Attorneys for Amici Curiae*

(Counsel for individual Amici Curiae on inside cover)

*Counsel for Individual Amici Curiae*

J. Albert Woll
815 15th Street N.W.
Washington, D.C. 20005

Thomas E. Harris
815 16th Street N.W.
Washington, D.C. 20006

*for AFL-CIO*

John Ligtenberg
Andrew J. Leahy
134 No. LaSalle Street
Chicago, Illinois 60602

*for American Federation of Teachers*

Stephen I. Schlossberg
8000 E. Jefferson Avenue
Detroit, Michigan 48214

*for International Union, United Automobile Workers*

Derrick A. Bell, Jr.
University Park
Los Angeles, Calif. 90007

Harold W. Horowitz
405 Hilgarde Avenue
Los Angeles, Calif. 90024

*for Western Center on Law and Poverty*

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## AS AMICI CURIAE

The undersigned hereby move for leave to file the attached brief supporting the Jurisdictional Statement in the above-entitled case. Appellees' counsel have refused consent to the filing of an amicus brief.

The interests of the amici are set forth on pages 2-3 of the attached brief.

Respectfully submitted,

Joseph L. Rauh, Jr.
John Silard
Elliott C. Lichtman
Rauh and Silard
1001 Connecticut Ave. N.W.
Washington, D.C. 20036
*Attorneys for Amici Curiae*

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International Union, UAW
Western Center on Law and Poverty

**AS AMICI CURIAE**

---

## INTERESTS OF AMICI

1. The American Federation of Labor-Congress of Industrial Organizations is a federation of 122 national and international labor organizations having a total membership of approximately 12,500,000. The American labor movement has throughout its history sought maximum educational opportunity for all children. Unions played a

major role in the establishment of public schools early in the 19th century and have continuously worked for the extension and improvement of public education. This case directly involves the quality of schooling and the integrity of the public education concept in theory and in practice throughout the United States.

2. The American Federation of Teachers is a union with a membership of about 175,000 public school teachers. Its locals are found throughout the country, with the greatest concentration of locals and members in many of the states where the issues raised in this case are most acutely presented. The financial problems of public education are of direct concern to every one of its members and vitally affect the realization of the educational goals for which the AFT has striven throughout its existence.

3. The United Automobile Workers and its nearly one and a half million industrial-worker members are vitally interested in quality public education for all our children. Having long supported the interests of the disadvantaged and the poor, UAW believes strongly in equality of educational opportunity and believes that a public education system built on inequality plainly violates fundamental constitutional guarantees.

4. The Western Center on Law and Poverty, funded primarily by the Office of Economic Opportunity, is a consortium of OEO-supported legal services programs and law schools in Southern California. It serves as a central research and technical assistance agency for these legal services programs, and has been active in efforts to achieve equality of educational opportunity for the poor. Lawyers affiliated with the Center are counsel for plaintiffs in *Serrano* v. *Priest*, No. 938254, Superior Court, County of Los Angeles, similar to the case now before this Court.

## STATEMENT: WEIGHTY CONSTITUTIONAL ISSUES ARISE FROM PUBLIC EDUCATION INEQUALITIES IN ILLINOIS AND NUMEROUS OTHER STATES OF THE UNION.

This case raises novel and important constitutional questions concerning the financing of public school education in Illinois. Plaintiffs challenge a system whereby the accident of a child's place of residence determines whether he receives a superior, an average, or a greatly inferior public education. Notwithstanding the gravity of the constitutional issues evoked, the Court below dismissed plaintiffs' claim on the bare pleadings, without the benefit of a trial of the material facts necessary to informed adjudication of the complex issues at bar. Amici in this brief urge that the District Court erred in resolving these questions in the present posture of the case. We suggest that this Court remand to the District Court for a trial of the material facts because ". . . it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer" (*Borden's Co.* v. *Baldwin*, 293 U.S. 194, 213 (concurring opinion of Justices Stone and Cardozo)).

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In the pending case this Court's attention is directed for the first time to tragic inequalities in the public education systems of many of our states. See generally F. Keppel, The Necessary Revolution in American Education 80 (1966); J. Conant, Slums and Suburbs 145 (1961). In its early years the public education movement in the United States gave promise of a great egalitarian reform: the children of poor families unable to afford private education would receive their preparation for life and livelihood through public support. J. Quincy, Municipal History of

the Town and City of Boston 21-22 (1852). See *Brown* v. *Board of Education*, 347 U.S. 483, 493. But it was soon discovered that some localities were too impoverished to bear so significant a fiscal burden from local tax revenues; accordingly, early in the development of our public education systems most states adopted equalizing "flat grant" and "foundation plan" payments of direct state money supplements to local school districts.

Today it is clear that these state aid measures have failed in their egalitarian intent. For in numerous states (including the largest and most populous) there exists a first rate public education for some children, only passable schooling for others, and a vastly inferior public education for children in poorer areas—chiefly our central cities and small rural localities. Public education in many of our states presents a picture of four-fold inequality: i. gross malapportionment of school districts with respect to their resources for school finance; ii. great disparities (as much as 7 to 1) between school districts in per-pupil expenditures; iii. vast inequalities in the public education thus provided for children within the same state; and iv. inferior public schooling and preparation for life and livelihood for the poorest and most needy children. These multiple inequalities underly this case and similar suits pending in state and federal courts in California,[1] Michigan,[2] and Texas,[3] which invoke substantial equal protection issues under this Court's previous decisions. See generally Horowitz, *Unseparate but Unequal—the Emerging Fourteenth Amendment Issue in Public School Education*, 13 U.C.L.A. L. Rev. 1147 (1966).

i. *Malapportionment of School Districts.* The ultimate

[1] *Serrano* v. *Priest*, No. 938254, Superior Court, County of Los Angeles, Cal., dismissed January 8, 1969 on authority of present case.

[2] *Detroit Board of Education* v. *Michigan*, No. 103342, Circuit Court, Wayne County, Mich.

[3] *Rodriguez* v. *San Antonio Independent School District*, No. 68-175 S.A., U.S.D.C., W.D. Tex.

cause of the constitutional infringements presently in issue is the malapportionment (or non-apportionment) of school districts with respect to their ability to finance public education. Under state laws and constitutions throughout the nation public education is a state responsibility,[4] and the establishment of school districts[5] and operation of public schools is regulated by state law. Typically, the legislature provides that, except as supplemented by state payments to local districts, the principal fiscal burden for the operation of public schools is borne by local levy of taxes upon property within the school district A. Wise, *supra* note 5 at 127. Due to historic fortuity aggravated by the force of political inertia, today's school districts are grossly malapportioned with respect to their ability to finance from local revenues the education which it is their function to provide. Measured by per-pupil assessed property value in the district, the magnitude of the malapportionment in ability to finance education at comparable property tax rates is typically on the order of 50 to 1, 100 to 1, and even greater disparities between the state's wealthiest and poorest districts. In Illinois the Monticello District has a per-pupil valuation of property available for school taxation of $114,000, while Brookport District has $3,000; in Michigan the River Rouge District's property valuation per pupil is $53,156, while Forsyth is $1,319; in California the Big Creek District has $306,077 per aver-

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[4] State constitutions commonly provide that public education is a state function entrusted to the preservation and control of the legislature. Mich. Const., art. VIII; Ill. Const., art. VIII; Cal. Const., art. IX. See *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649, 657 (E.D. La. 1961) *aff'd*, 368 U.S. 515.

[5] N.Y. Consol. Laws §§ 310, 1505 (McKinney 1953); Mich. Stat. Ann. 15.3402 (1968); *Kinney* v. *County Bd. of School Trustees*, 7 Ill. App. 2d 286, 289, 129 N.E. 2d 292 (1955); *County School Trustees* v. *Common School District No. 6*, 284 S.W. 306, 307 (Tex. Civ. App. 1926); A. Wise, Rich Schools, Poor Schools, 93-112 (1968).

age daily pupil attendance, while Olinda District has $3,698; the range in New York is from over $200,000 to under $5,000.[6]

The gross malapportionment of public school districts with respect to their ability to provide comparable education surely gives rise to profound constitutional questions under this Court's rulings. In striking down malapportionment of state legislatures, this Court has emphasized that legislators "represent people, not trees or acres" (*Reynolds* v. *Sims*, 377 U.S. 533, 562), and that a system which gives one citizen substantially more voting strength than another in the selection of the legislature is antithetical to the very function of representing these citizens. In like measure, gross malapportionment of school districts with respect to their taxable wealth—and thus their ability to finance public schooling—disserves the very function of providing public education for which school districts exist. As much as there is no credible basis for favoring one voter over another in the voting booth, education is a process of instructing individual human beings in which no rationality underlies the preferment of a child in one school district over the child residing in another. Yet exactly that preferment arises from the existing malapportionment of school district wealth, which results in major and arbitrary inequalities in the actual funding of public schools within different districts of the state.

ii. *Disparities in School Funding.* The malapportionment of school districts with respect to their taxable wealth results in great disparities in school funding, notwithstand-

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[6] See Appendix, *infra*, p. 25; J. A. Thomas, School Finance and Educational Opportunity in Michigan 20 (1968); California State Department of Education, Average Daily Attendance and Selected Financial Statistics of California School Districts 1965-66, pp. 134, 115 (1967); Allen, *The State, Educational Priorities, and Local Financing,* Integrated Education 55, 58-59 (Sept.-Oct. 1968).

ing state "equalizing" supplements and the heavier tax rates which poorer districts typically impose to meet minimum education requirements. Thus, most states provide per-pupil "flat grants", and "foundation plan" supplements to school districts in amounts as high as $300 or $400 per child—supplements usually somewhat weighted to favor the poorer school districts. However, the state aid amounts are usually at or near the lowest per-child expenditure levels in the state so that their equalizing impact is very limited. Then too, poorer districts tend to impose on themselves substantially higher school tax rates to produce school revenues: in the present case the record shows poorer Illinois districts imposing as much as *two and three times* the tax rate of the wealthy districts and as much as the statute allows. See Appendix, *infra,* p. 25. Yet these efforts to reduce the impact of school district malapportionment leave gross inequalities, as high as 7 to 1, between the per-child expenditure in the state's wealthiest and poorest districts. Thus, in Virginia the annual per-child expenditure ranges from $541 in Arlington County to $72 in Buchanan County; in Illinois from $1,084 in Flannigan District to $350 in Albers; in California from $1,353 in one elementary school district to $265 in another; in New York from $1,600 to $470.[7] See also Office of Education, HEW, Profiles in School Support 70-74 (1965).

No discernible pattern underlies the differing levels of per-child public school expenditure within different districts of the state. A map of school district expenditure levels is a crazy quilt of fortuitous differentiation, be-

[7] Study Committee, Raising the Level of Public Education in Virginia 98-103 (1967); Appendix, *infra,* p. 23; Horowitz and Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs from Place to Place within a State,* 15 U.C.L.A. L. Rev. 787, 806; Allen, *supra* n. 6 at 58.

cause the state's investment in the public education of its children simply reflects haphazard variables of disparate local wealth and effort. Once again this Court's rulings become pertinent. Where the state legislature has made material distinctions favoring some classes and groups against others, this Court has gone far to uphold them in deference to state judgments of public policy; but where state law vests wholly haphazard and arbitrary disadvantages on persons not differently situated there is no occasion for judicial deference to any state policy judgments. See, e.g., *Morey* v. *Doud,* 354 U.S. 457, 465-66; *McLaughlin* v. *Florida,* 379 U.S. 184, 190; *Baker* v. *Carr,* 369 U.S. 186, 226; *Allied Stores of Ohio* v. *Bowers,* 358 U.S. 522, 527-28; *Rinaldi* v. *Yeager,* 384 U.S. 305, 308-09. Just such haphazard disadvantage is the result of existing public school funding differentials, for a district with a half or third as much as another to spend for educating the school child necessarily offers a vastly inferior public education.

iii. *Inequality in Educational Offering.* What children receive in public schools is not money but education. Thus, the ultimate test of equal protection in public education looks beyond school district wealth and expenditures to the actual education offered to school children. Such scrutiny confirms the obvious: a child receiving a public school education at an annual expenditure level of $400-$500 is afforded schooling far inferior to the child for whom $1,000 is expended in a wealthier district. To some extent a poor district can compensate (at the price of inferior teaching capability) by paying lower salaries. Cost reduction is also achieved by having fewer teachers, thus suffering large and overcrowded classes with a reduced teaching and learning capability. Poorer districts also must forego facilities expensive to procure and maintain—libraries, laboratories, gymnasiums, special courses, remedial in-

struction, counseling, and the like. These disadvantages have been highlighted in a recent study by the Michigan Department of Education—"School Finance and Educational Opportunity in Michigan" (1968). Data there set forth (pp. 22-57) show the closest correlation between annual per-child expenditure levels and such education elements as class size, special classes and programs, teacher preparation, full-time principals, counseling services, research and testing, science laboratories, and library facilities. Similarly a recent Virginia report revealing school district disparities of per-pupil expenditures as great as 7 to 1 demonstrates parallel disparities in the districts' number of classrooms with more than 30 students, and in the percentage of teachers with degrees and some form of certificates.[8] These correlations demonstrate the obvious truth that more money buys a better education.

In sum, the available evidence shows that, as a consequence of existing school district malapportionment, children in wealthier school districts receive a quality public education while those in poorer districts are offered cheap and inferior schooling. Such public school inequality thrust upon children merely because of the poverty of their school district invokes a serious issue of equal protection. While arising in a racial setting, in cases under the *Plessy* doctrine (e.g., *Sweatt* v. *Painter*, 339 U.S. 629; *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637) this Court found a right of public school equality to inhere in the Equal Protection Clause, which survived until *Brown* v. *Board of Education*, 347 U.S. 483. In turn, *Brown* reiterated the right to equality in public education, emphasizing that with respect to the opportunity of an education "[s]*uch an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms*"

[8] Study Committee, *supra*, note 7 at 35-40, 47-49, 80-82, 98-103. See also A. Wise, *supra* note 5 at 136-38.

(Id. at 493, our emphasis). That right was upheld against state infringement in *Griffin* v. *School Board*, 377 U.S. 218 and in *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649, 651 (E.D. La. 1961) *aff'd*, 368 U.S. 515, where the District Court found that closing public schools in a single parish of the state would "unfairly discriminate against the residents of that parish, irrespective of race."

Under this Court's previous rulings gross and arbitrary public education inequality invokes a serious constitutional question. It does so all the more in view of the fact that it is the children of the poor—those most needy of education—who are the principal victims of the present inequalities.

iv. *Inferior Public Education for the Poor.* The ultimate paradox illumined by the pending case is that while children in the state's affluent areas enjoy high quality public education, the needy children of urban slums and rural poverty are condemned to suffer cheap and inferior public schooling. While members of state legislatures may not consciously intend it, because community wealth is the key determinant of the public education offered the inevitable consequence of the present inequalities is that poor children *most* needy of a good public education [9] are those most often denied it.

The economics of home ownership have produced great

[9] "Using achievement test data for the school year 1962-63, the study found a substantial difference in the educational requirements of urban, suburban and rural school populations. Urban districts, as defined in this study, contained 25 percent of the state's public school pupils. Yet, these same districts contained 66 percent of the state's pupils in school districts or attendance areas with average achievement test scores one-half grade or more below equated norms. Pupils in suburban districts represented 49 percent of the state's pupils and only 8 percent of pupils in low achieving districts or attendance areas. Pupils in rural districts represented 26 percent of the state's pupils and a proportional 26 percent of the pupils in low achieving districts." Fels Institute of Local and State Government, Special Education and Fiscal Requirements of Urban School Districts in Pennsylvania (2-3) (1964).

areas of wealth and poverty within the state. Where the wealthy live property values are high and a large taxable base exists for financing public schools. Conversely, the poor live where property values are the lowest and where, under the present system of malapportioned school districts, the least taxable property is available for public education. The poor are thus caught in a vicious circle where the offering of unequal public education in different school districts thrusts the disadvantages of the father upon the child. From public revenue the children of wealth obtain a first rate public education enabling them to go on to college, career, and continued affluence. Meanwhile, the children of the poor are afforded inferior public schools where they are discouraged from graduating, educated too poorly to enter college, and thus prepared only for a life of continued poverty.

Without overstatement it can be said of the present situation that the state is operating a system of public education which perpetuates the prospects of a lifetime of poverty for the children of the poor. In *Griffin* v. *Illinois,* 351 U.S. 12, *Douglas* v. *California,* 372 U.S. 353, and *Harper* v. *Virginia Bd. of Elections,* 383 U.S. 663, this Court struck down laws having unequal effect upon the poor. As the Court reminded in invalidating the Virginia poll tax in *Harper* (at p. 668), "Lines drawn on the basis of wealth or property, like those of race. . . . are traditionally disfavored." To deny any children equality of public education merely because of the poverty of their school district is bad enough. Systematically to thrust inferior public education upon the children of the poor, perpetuating family poverty from generation to generation, is to exceed all defensible bounds.

• • • • •

The foregoing exposition underlines the multiple inequalities existing in public education in many of our states and highlighted in the present case—malapportionment of school district wealth, disparities in public school funding, inequality of public education, and inferior public education for children of the poor. Each of these inequalities presents a tangible constitutional question, and manifestly the confluence of all four raises a substantial equal protection issue. See *Reynolds* v. *Sims, supra; Morey* v. *Doud, supra; Brown* v. *Board of Education, supra; Harper* v. *Virginia Bd. of Elections, supra.*[10] Surely the constitutional questions plaintiffs sought to plead entitled them to a trial. However, by summary dismissal of the action the Court below short-circuited the process of constitutional adjudication. We urge in the Argument that this Court return the case for a trial, where the material facts governing the grave constitutional issues presented can be adjudicated through orderly process.

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[10] In urging that grave constitutional questions arise from inequality of public education in different districts within the state, we do not mean to suggest that similar inequalities as between states of the union would invoke constitutional doubts. To suggest that states vis-a-vis the federal government are analogous to local school districts vis-a-vis the state would be to defy the teaching of history and the nature of the federal union. In a similar setting involving malapportionment of the legislature, this court in *Reynolds* v. *Sims*, 377 U.S. 533, 574, recently rejected such an analogy in presently applicable terms:

> "The system of representation in the two Houses of the Federal Congress is one ingrained in our Constitution, as part of the law of the land. It is one conceived out of compromise and concession indispensable to the establishment of our federal public. Arising from unique historical circumstances, it is based on the consideration that in establishing our type of federalism a group of formerly independent States bound themselves together under one national government. Admittedly, the original 13 States surrendered some of their sovereignty in agreeing to join together 'to form a more perfect Union.' But at the heart of our constitutional system remains the concept of separate and distinct governmental entities which have delegated some, but not all, of their formerly held powers to the single national government . . ."

## ARGUMENT: THE COURT BELOW ERRED IN DECIDING CONSTITUTIONAL ISSUES NOT PROPERLY RESOLVABLE BEFORE TRIAL OF THE MATERIAL CONSTITUTIONAL FACTS.

Vital constitutional questions inhere in the pending suit, but on the present record the Court below was not in a position to resolve them. This Court's general rule against premature constitutional adjudication (*Ashwander* v. *Valley Authority,* 297 U.S. 288; *Rescue Army* v. *Municipal Court,* 331 U.S. 549) has special applicability where on the bare pleadings a court does not yet have the material facts for resolution of a novel and important constitutional issue. The impropriety of constitutional decision on the pleadings is highlighted by *Borden's Co.* v. *Baldwin,* 293 U.S. 194, 209, where the Court refused to decide a constitutional issue at the pleading stage because it turned on "facts which are the proper subjects of evidence and of determinations of fact by the trial court."[11] The principle has special applicability where the relevant facts are complex or there is presented a major constitutional question of

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[11] In *Borden's* the Commissioner of Agriculture of New York was sued by a party asserting that the state's milk control law violated the Fourteenth Amendment. After presentation of opposing affidavits a three-judge District Court dismissed the complaint for failure to state a constitutional cause of action. This Court reversed for a trial of the constitutional question:

> "For the present purpose, it is sufficient to say that these arguments are addressed to particular trade conditions in the city of New York, which largely lie outside the range of judicial notice. Counsel refer to the affidavits submitted on the motion for injunction. And we are asked to extract from various tables and statements in the reports of the legislative committee, which were not addressed to the fixing of the differential here in question, sufficient data upon which to predicate a judgment. But the case is not before us upon evidence, or upon determinations of fact based on evidence, as the complaint was dismissed solely in the view that it failed to state a cause of action . . . the decision of this appeal should not turn on . . . facts which are the proper subjects of evidence and of determinations of fact by the trial court" (293 U.S. at 208-209).

first impression. As emphasized in *Borden's* (at 212), the Court's earlier ruling in *Hammond* v. *Schappi Bus Line*, 275 U.S. 164, 172, held that "before the questions of constitutional law, both novel and of far reaching importance, were passed upon by this Court, 'the facts essential to their decision should be definitely found by the lower courts upon adequate evidence.'" Accord: *Polk Co.* v. *Glover*, 305 U.S. 5, 10; *Wilshire Oil Company* v. *United States*, 295 U.S. 100, 102-103; cf. *Chicago & Grand Trunk Railway* v. *Wellman*, 143 U.S. 339, 346.[12] This important principle was recently applied in emphatic terms in *United States* v. *Auto Workers*, 352 U.S. 567. There, upon direct appeal from a district court dismissal this Court declined to resolve constitutional issues because "only an adjudication on the merits can provide the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision." Noting that "[m]atter now buried under abstract constitutional issues may, by the elucidation of a trial, be brought to the surface," the Court emphasized that allegations "hypothetically framed to elicit a ruling from this Court or based upon misunderstanding of the facts may not survive the test of proof" (*Id.* at 591, 592). *Cf. Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256-57.

This Court's warning against resolution of complex and novel constitutional issues upon bare pleadings has manifest applicability in the present case. Avoiding resolution of constitutional questions on the pleadings serves two salient purposes: when a novel constitutional issue arises from complex facts they should be clarified by a trial of fact, which also serves to expose the critical contentions of the opposing parties bearing on the constitutional issue for resolution. In the present case the disregard of the governing principle, over the plaintiff's objection to pre-

[12] See also Karst, *Legislative Facts in Constitutional Litigation*, Supreme Court Review 75, 95-103 (1960).

mature resolution,[13] leads the lower Court to salient errors of fact and law. It applies the wrong constitutional standard in rendering a merits ruling which confuses and obscures the central challenge at bar; it prematurely hypothesizes judicial incompetence to establish workable constitutional guidelines; and it obscures or begs relevant constitutional issues for lack of the material facts upon which they turn.

i. The Court below, while conceding that "the inequalities of the existing arrangement are readily apparent," (293 F. Supp. 327, 331) upholds the Illinois statutes on the ground that they are supported by a "rational" policy. This test is drawn from cases involving equal protection challenges to state economic regulation. However, in an individual rights setting this Court has long rejected "rational basis" as the applicable constitutional standard. It was, after all, the principal thrust of the landmark First Amendment rulings some thirty years ago that individual civil liberties take priority even over legitimate state interests, such as taxation, regulation and licensing.[14] And when "fundamental rights and liberties are asserted under the Equal Protection Clause, classification which might invade or restrain them must be closely scrutinized and carefully confined." *Harper* v. *Virginia Bd. of Elections,* 383 U.S. at 670. Accord: *Carrington* v. *Rash,* 380 U.S. 89, 96;

[13] The burden of plaintiffs' Brief in Opposition to the motion to dismiss below was that they had stated a cause of action upon which a trial was necessary. Indeed, they emphasized that this case turns upon a showing of actual inequality in education, for which a trial is required: ". . . Plaintiffs may not be able to demonstrate the factual inequality upon which their case is based. But the mere speculative difficulty of proof ought not deprive Plaintiffs of a hearing on such an important question. Once the fact of inequality is shown, judging the legality of those inequalities employs traditional standards" (Brief in Opposition, p. 81).

[14] *Schneider* v. *State,* 308 U.S. 147, 161; *Prince* v. *Massachusetts,* 321 U.S. 158, 164; *Murdock* v. *Pennsylvania,* 319 U.S. 105, 115; *Grosjean* v. *American Press,* 297 U.S. 233, 250; see *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152 n. 4.

*Reynolds* v. *Sims*. 377 U.S. at 561-62; *Skinner* v. *Oklahoma*, 316 U.S. 535, 541; *Williams* v. *Rhodes*, 393 U.S. 23, 31.

Mistakenly employing a "rational basis" criterion, the District Court compounds the error by a merits decision which confuses and obscures the actual constitutional challenge at bar. The Court belabors the virtues of "local control" of education and public school expenditure. What plaintiffs challenge is not local control, but the right of the state in providing education for its people to escape its equal protection responsibility—by delegating tax power to subdivisions greatly unequal in taxable resources for their school populations without compensating state financial assistance to avoid gross inequalities. As the Court stated in *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649, 657 (E.D. La. 1961), *aff'd*, 368 U.S. 515, localism "does not excuse inequalities in a state-wide, centrally financed and administered, system of public institutions." The state cannot avoid its constitutional responsibility under the Equal Protection Clause by "carve-outs of small units" (*Id.* at 658). As this Court recently noted in an analogous context in *Reynolds* v. *Sims*, 377 U.S. 533, 575:

> "Political subdivisions of States—counties, cities or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 178, these governmental units are created 'as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them,' and the 'number, nature, and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercised rests in the absolute discretion of the State.' "

The present objection is not to such public education inequalities as may result from local differences in school tax rates. Appellants' objection is that due to malapportionment they are denied equal schooling, although their school districts have taxed at the highest rates permitted by Illinois law and well above those of wealthier school districts. Under these circumstances the District Court's constitutional ruling confusing differing local effort with the critical issue of school district malapportionment was error, which underlines the wisdom of withholding constitutional decision until the adversary trial process has refined and clarified the precise contentions being urged by the opposing parties.

ii. Equally demonstrative of the dangers inhering in premature constitutional decision is the District Court's ruling that this case must be dismissed because no constitutional standard of public education equality can be judicially defined should the existing Illinois statutes be found invalid. Without even postulating the central constitutional *wrong* (school inequality resulting from district wealth malapportionment) the Court hypothesizes inability in any event to define the applicable constitutional *right*. But decisions of this Court emphasize that where a state law transgresses equal protection, courts will so rule without necessity for defining to the legislature alternative measures which would meet constitutional requirements. See, e.g., *Williams* v. *Rhodes*, 393 U.S. 23 (and concurring opinion of Mr. Justice Harlan at 48); *Baker* v. *Carr*, 369 U.S. 186.[15] Thus, the degree and character of the edu-

[15] As this Court held in *Baker* v. *Carr*, 369 U.S. at 226, to succeed in an equal protection challenge, litigants need not

> "ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action."

cational inequalities demonstrable in the present case may result in a finding that equal protection has been breached, leaving the legislature free to choose ameliorative measures of school district apportionment or school fund supplementation which would conform with the equality guarantee.

In any event, for purposes of the present challenge, there is no need to invoke either of the constitutional standards the Court below eschews: dollar equality for pupil education, and expenditures tailored to individual educational need. Rather, the dispositive constitutional standard adequate for the case at bar is one which would preclude a state from subjecting some of its children to tangibly inferior public education by reason of school district wealth malapportionment. But whatever constitutional standard may ultimately prevail, the Court below plainly puts the cart before the horse when at the pleadings stage it predicts judicial inability to define any constitutional right of equality in education. This Court was able to define and apply "equality" in the separate but equal cases arising from *Plessy—Sweatt* v. *Painter,* 339 U.S. 629; *McLaurin* v. *Oklahoma State Regents,* 339 U.S. 637—and lower courts applied that rule to entire school systems. See *Brown* v. *Board of Education,* 347 U.S. 483, 486, n. 1; cf. *United States* v. *Jefferson County Board of Education,* 372 F. 2d 836, 899-900, 380 F. 2d 385, 393-394, cert. denied, 389 U.S. 840. It seems equally likely that in the present context a workable constitutional standard will emerge when the principal constitutional points have been clarified by trial proceedings, and that at this stage the problems of judicial competence anticipated by the District Court are entirely conjectural and premature.

iii. Finally, for want of the material facts the ruling below begs the critical constitutional issues. These are issues concerning the inequalities cited by plaintiffs and

the justifications advanced by defendants, and they are numerous: What degree of school district wealth malapportionment exists in Illinois, how did it originate, and what state objectives does it serve? How far is malapportionment in ability to finance education as between school districts reflected in unequal expenditures per pupil, both before and after state equalizing supplements and increased local tax rates? How severe is the actual inequality in public education offered to children in Illinois, particularly as concerns teacher-pupil ratios, qualifications of the teaching staff, educational facilities and resources, school equipment, libraries, laboratories, gymnasiums, and other like indicia? What is the effect of public education inequalities upon pupil achievement—do they systematically affect the children of poorer families so that they are further disabled from overcoming their heritage of poverty? It is these and similarly seminal questions which the Court below entirely obscures, when without benefit of the material facts it purports to decide the ultimate constitutional questions.

## CONCLUSION

The mistake of the Court below was in reaching and deciding ultimate constitutional issues at a preliminary stage of the proceedings when meaningful adjudication was not yet possible. In numerous respects the opinion below attests to the wisdom of this Court's *Borden's* stricture against the resolution of complex and novel constitutional issues upon the pleadings. The lower Court's opinion confirms the "salutory principle" that the "essential facts should be determined before passing upon grave constitutional questions. . ." *Polk Co.* v. *Glover,* 305 U.S. 5, 10. To invoke that principle here, this Court can and should reverse and direct a trial, and is free to "intimate no opinion" on the ultimate merits issues at this juncture

(*Ibid.*). This Court, of course, is in no better position to resolve the constitutional questions presented before the material facts have been established by a trial of the case. If the Court were to note probable jurisdiction (or postpone to the merits) it would be inviting detailed briefs by the parties and amici curiae tendering facts which have not met the test of trial evaluation. If, on the other hand, the Court were to affirm or dismiss, lower courts might treat the action as precedent against the constitutional claims being advanced in other pending cases unless this Court's action were rested on procedural or pleading grounds.

We therefore most respectfully suggest that the Court remand this case for a trial to develop the material facts so that the vital constitutional issues presented can be adjudicated through orderly process. Whatever may be the ultimate outcome of the pending and future litigation seeking to redress inequalities in public education, this Court certainly would not want to approve the lower Court's sweeping and premature ruling on the merits of constitutional issues so vital to the future of the nation.

Respectfully submitted,

Joseph L. Rauh, Jr.
John Silard
Elliott C. Lichtman
Rauh and Silard
1001 Connecticut Ave., N.W.
Washington, D.C. 20036
*Attorneys for Amici Curiae*

*Of Counsel:*
Benjamin V. Cohen
Washington, D.C.

J. Albert Woll
815 15th Street N.W.
Washington, D.C. 20005
Thomas E. Harris
815 16th Street N.W.
Washington, D.C. 20006
*Attorneys for AFL-CIO*

John Ligtenberg
Andrew J. Leahy
134 No. LaSalle Street
Chicago, Illinois 60602
*Attorneys for American Federation of Teachers*

Stephen I. Schlossberg
8000 E. Jefferson Ave.
Detroit, Michigan 48214
*Attorney for International Union, United Automobile Workers*

Derrick A. Bell, Jr.
University Park
Los Angeles, Calif. 90007
Harold W. Horowitz
405 Hilgarde Avenue
Los Angeles, Calif. 90024
*Attorneys for Western Center on Law and Poverty*

# APPENDIX

ESTIMATED EXPENDITURE PER PUPIL IN SELECTED ILLINOIS ELEMENTARY DISTRICTS [1]

| District Name | Assessed Valuation per average daily attendance | Tax Rate (per $100 assessed valuation) | Total funds (including state supplement payments) per average daily attendance |
|---|---|---|---|
| Flannigan | $112,000 | $0.890 | $1,084 |
| Millbrook | 87,000 | 0.835 | 815 |
| Raccoon | 75,000 | 0.838 | 716 |
| Bryce Ash | 65,000 | 0.860 | 639 |
| Duncan | 57,000 | 0.935 | 610 |
| Freedom | 52,000 | 0.764 | 466 |
| Hill City | 48,000 | 1.067 | 592 |
| Argo Summit | 44,000 | 1.165 | 565 |
| Tonica | 41,000 | 0.910 | 444 |
| Kildeer Countryside | 39,000 | 1.590 | 724 |
| Irvington | 37,000 | 0.931 | 434 |
| Belle Valley | 35,000 | 0.897 | 537 |
| Oskaloosa | 33,000 | 0.858 | 412 |
| Lotus Country | 31,000 | 1.350 | 543 |
| Beaver Creek Comm. | 29,000 | 1.120 | 477 |
| Hines | 27,000 | 1.228 | 466 |
| Brookfield | 25,000 | 1.457 | 521 |
| Center Hill | 23,000 | 1.032 | 429 |
| Lenzburg | 21,000 | 0.849 | 357 |
| East Maine | 19,000 | 1.650 | 511 |
| South Stickney | 17,000 | 1.520 | 470 |
| Mill Shoals | 15,000 | 1.170 | 410 |
| Opdyke | 13,000 | 1.170 | 414 |
| Chicage Ridge | 11,000 | 1.395 | 409 |
| Metropolis | 9,000 | 1.089 | 379 |
| Albers | 6,000 | 0.838 | 350 |

[1] Digested from tables 13, 15 and 17 of Brief in Opposition to Defendants' Motion to Dismiss. Data based on 1965-1966 Foundation Formula and 1964 tax rates.

ESTIMATED EXPENDITURE PER PUPIL IN SELECTED ILLINOIS SECONDARY DISTRICTS

| District Name | Assessed Valuation per average daily attendance | Tax Rate (per $100 assessed valuation) | Total funds (including state supplement payments) per average daily attendance |
|---|---|---|---|
| Bellflower | $168,000 | $0.562 | $1,012 |
| Malden | 108,000 | 0.937 | 1,136 |
| Neponset | 93,000 | 1.019 | 1,064 |
| Cornell | 85,000 | 0.957 | 962 |
| Rochelle | 77,000 | 0.857 | 749 |
| Woodstock | 74,000 | 0.836 | 728 |
| Antioch | 68,000 | 0.958 | 797 |
| Henry-Senachwine | 65,000 | 0.857 | 655 |
| Bradley-Bourbonnais | 62,000 | 0.895 | 637 |
| Tower Hill | 59,000 | 1.020 | 711 |
| Glenbard | 56,000 | 1.178 | 730 |
| Lisle | 54,000 | 1.128 | 676 |
| Fenton | 51,000 | 1.208 | 684 |
| Grayslake | 48,000 | 1.304 | 748 |
| Cowden | 45,000 | 1.208 | 640 |
| Flora | 42,000 | 1.008 | 507 |
| Rock Falls | 39,000 | 1.230 | 567 |
| Sumner | 37,000 | 1.163 | 550 |
| St. Francisville | 32,000 | 1.230 | 545 |
| Riverton | 29,000 | 1.077 | 441 |
| Alto Pass | 26,000 | 1.210 | 480 |
| Christopher | 24,000 | 1.230 | 482 |

ESTIMATED EXPENDITURE PER PUPIL IN SELECTED ILLINOIS UNIT DISTRICTS

| District Name | Assessed Valuation per average daily attendance | Tax Rate (per $100 assessed valuation) | Total funds (including state supplement payments) per average daily attendance |
|---|---|---|---|
| Monticello | $114,000 | $0.524 | $672 |
| Hartsburg-Emden | 46,000 | 1.509 | 792 |
| New Holland | 42,000 | 1.467 | 712 |
| Melvin-Sibley | 38,000 | 1.475 | 643 |
| Stanford | 36,000 | 1.504 | 623 |
| Waverly | 32,000 | 1.520 | 577 |
| Hopedale | 30,000 | 1.535 | 557 |
| Spoon River Valley | 28,000 | 1.634 | 572 |
| Manteno | 26,000 | 1.520 | 540 |
| Mahomet | 24,000 | 1.520 | 521 |
| Chicago | 23,000 | 1.856 | 585 |
| Genesco | 22,000 | 1.416 | 469 |
| Pleasant Hill | 20,000 | 1.520 | 491 |
| Rock Island | 18,000 | 1.491 | 475 |
| Comm. Unit School (Robertson) | 16,000 | 1.520 | 451 |
| North Green Unit | 14,000 | 1.770 | 477 |
| Marseilles | 12,000 | 1.680 | 440 |
| Pope County Comm. U. | 10,000 | 1.520 | 439 |
| Cobden | 8,000 | 1.520 | 407 |
| Bethalto | 7,000 | 1.670 | 405 |
| Brookport | 3,000 | 1.520 | 366 |